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No. 88-309

In The

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF FOR THE RESPONDENTS BRADFORD BATH, DONALD BATH, DHB & CO., GRIFFIN BROTHERS, INCORPORATED, ALBERT HORNECKER, HORNECKER LIVESTOCK CO., INC., ELSIE MARTIN, RICHARD MARTIN, PLB & CO., CHARLES RICHARDSON, AND RALPH FLOYD URBIGKIT.

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STATEMENT OF THE CASE

The Wind River Indian Reservation was formed by the Second Treaty of Fort Bridger, 15 Stat. 673 (1868), with the Shoshone Tribe. (Pet. App. AA, at 793a, hereinafter referred to as Pet. App.) These lands consisted primarily of the watershed of the Wind River from the Wind River Mountains of Wyoming and were considered the choicest and best watered portion of Wyoming. *United States v. Shoshone Tribe*, 304 US 111, 114 (1838). Much to the chagrin of the Shoshone Tribe, the Northern Arapaho Tribe was added to the Wind River Indian Reservation in 1878. *Shoshone Tribe v. United States*, 299 US 476 (1937); *United States v. Shoshone Tribe*, 304 US 111 (1938).

In 1872 the Shoshone Tribe sold to the United States 700,642 acres under the Brunot Agreement, 18 Stat. 291. In 1896 the Shoshone and Northern Arapaho Tribes sold 55,000 acres to the United States under the First McLaughlin Agreement, 30 Stat. 62.

In 1904 the Shoshone and Arapaho Tribes entered into the Second McLaughlin Agreement, 33 Stat. 1016 (Pet. App. at 769a), whereby 1,480,000 acres of the Reservation, essentially its' northern two-thirds, were opened for non-Indian settlement. Of this land approximately 128,986 acres were sold by 1914. Pet. App. at 412a. Another 336,000 acres were withdrawn for a major reclamation project by an Act of March 4, 1921, Ch. 161, 41 Stat. 1367.

The General Allotment Act of 1887, Ch. 119, 24 Stat. 388, 25 U.S.C. § 331, provided for the breaking up of reservation lands, including the Wind River Indian Reservation, into allotments to be given to the individual tribal

members. This was in addition to the allotments which were provided for in the Treaty of 1868. For a trust period of 25 years the General Allotment Act of 1887 provided that the Indian allottee owner could make application for fee ownership. After which time the fee owner could alienate the land as he wished, including selling to a non-Indian. Forty-two thousand acres of land on the Reservation have passed out of individual Indian ownership to non-Indians since the early 1900's. Wyo. Ex. PW-2.

With the assistance of the Government Agent of the Wind River Indian Reservation, water development proceeded on the Reservation so that by 1905 over 60 permits covering over 123,000 acres of land had been submitted to the Wyoming State Engineer. Wyo. Ex. I & P-101.

The Respondents of this brief, all non-Indian farmers and ranchers on the Wind River Indian Reservation, are all successors in interest to individual Indian allotments under the General Allotment Act of 1887. In total these individuals represent approximately 1,600 acres of irrigated property. Pet. App. 131a-157a. These individual irrigators were parties to the underlying lawsuit claiming that if the Reservation were given a reserved water right with a priority date of 1868, then they were entitled to the same right as successors in interest to the original allottees on the Reservation. The Special Master and the District Court found against these Respondents, but the Supreme Court reversed finding that these non-Indian successors to Indian allotments must be awarded the reserved water right with an 1868 priority date for the practicable irrigable acreage they can show were irrigated

by their Indian predecessors or put into irrigation within a reasonable time thereafter. Pet. App. 72a-75a.

In the water adjudication suit below, the Wyoming District Court, entered an award to the Tribe of approximately 500,000 acre feet to irrigate approximately 103,000 acres. Fifty-four thousand of the 103,000 acres had been historically irrigated at one time or another and contained under a State Permit. Forty-nine thousand acres were awarded for future projects, of which approximately 20,000 acres had been covered by previous State Permits but had not been put to beneficial use. Pet. App. 267a, 268a.

SUMMARY OF ARGUMENT

The Wind River Indian Reservation, home to the Eastern Shoshone and Northern Arapaho Tribes, was created by treaty with the Shoshone Tribe on July 3, 1868. The original purpose of the Reservation was to provide the Shoshone Tribe (and later the Arapaho Tribe) a certain segment of land and then to civilize and assimilate the Tribes into the American culture. As set out in the treaty, civilization and assimilation were to be achieved through education, allotments of land to individual Indians, and the encouragement of agriculture on those allotments.

The Purposes of the Reservation, i.e., that of creating a homeland and of converting the Tribes from being nomadic hunters and gatherers into a civilized people have long been achieved without the use of an implied water right. Present day irrigation on the reservation

today serves only a secondary purpose of providing limited employment and income to the Reservation.

In the underlying adjudication to all waters on the Big Horn River Basin, which includes the Wind River Indian Reservation, the Wyoming Courts found that Congress impliedly reserved water in the treaty of 1868 to satisfy the purposes of the reservation. They then went on to find that the "purpose" of the reservation was agricultural and quantified that right, using the practicable irrigable acreage method, at approximately 500,000 acre feet of water to irrigate 103,000 acres of land. This award of acre feet was awarded to the Tribes, not to the owners of the agricultural allotments mentioned in the Treaty.

In finding an implied-reservation-of-water for agricultural purposes in the 1868 treaty with the Shoshone Tribe the Wyoming Supreme Court has ignored both the historical context and the specific language of the treaty and misconstrued the purpose of the Reservation as "agricultural" rather than recognizing that agriculture was simply a method to be used at the time of the creation of the Reservation to achieve the real purpose of the treaty, that of civilization and assimilation of the Tribes to the American culture.

As early as 1905 the Wind River Indian Reservation had State Water Permits for 123,000 acres of land within the Reservation. These water rights with 1905 and earlier appropriation dates assured that the farmers of individual allotments who had left their nomadic hunting and gathering ways would have the necessary water to irrigate their land.

The use of an implied water right based upon practicable irrigable acreage should not be applied to the Wind River Indian Reservation as it has no relationship to achieving the original purposes of the Reservation.

ARGUMENT

I. THE PURPOSES OF THE RESERVATION AS SET OUT IN THE TREATY OF 1868 WERE TO PROVIDE A HOMELAND FOR THE SHOSHONE TRIBE AND TO ASSIMILATE THE INDIANS INTO THE AMERICAN CULTURE BY WAY OF EDUCATION AND AGRICULTURE.

A. ASSIMILATION

The policy of assimilating the Indian population into the American culture was officially sanctioned by the United States Congress as early as the Act of March 3, 1819, entitled "an Act making provision for the civilization of the Indian tribes adjoining the frontier settlements."[1] Section 1 of this Act declared that the purpose of the Act was to provide against the further decline and final extinction of the Indian tribes, by introducing among them the habits and arts of civilization, by instructing them in the mode of agriculture suited to their situation and for teaching their children in reading, writing and arithmetic.[2]

Following the end of the Civil War in 1865 it was recognized that the advancing tide of settlement ended

[1] Ch. 85, 3 Stat. 516 (§ 1 codified at 25. U.S.C. § 271).

[2] § 1, 3 Stat. at 516.

the possibility of geographically separating the Indian from the non-Indian. "Assimilation, allotment, and citizenship became the watchwords of official Policy."[3]

In 1868, the United States, although starting into the industrial revolution, was still an agricultural society. In 1870, 48% of the population of the United States lived on farms and made their living from agriculture.[4] Transforming the nomadic Shoshone males into individual farmers of their own allotments and educating their children was seen as insuring the "civilization" of the tribes entering into the Treaty and assimilation into the American culture.

The assimilation of the Tribes into a civilized people through education was set out in the Treaty through Article 7 which provided "In order to *insure the civilization* of the tribes entering into this treaty, the necessity of education is admitted . . . " and the Indians pledged to compel their children between the ages of six and sixteen to attend school where they would be taught the "elementary branches of an English education". (Emphasis added.) Pet. App. at 798a. In Article 3 the United States agreed to build a schoolhouse. Pet. App. at 796a. Under Article 10 the United States agreed to annually furnish teachers to the Indians. Pet. App. at 800a.

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[3] F. Cohen, *Handbook of Federal Indian Law*, 1982 ed., at 106.

[4] *Historical Statistics of the United States, Colonial Times to 1970*, U.S. Dept. of Commerce, Bureau of the Census, Bicentennial Ed., Series D 11-25 Labor Status of the Population: 1870 to 1970.

The further civilization of the Shoshone Tribe was to be accomplished pursuant to the Treaty by the breaking up of tribal ownership of the Reservation through the establishment of allotments for those interested in commencing farming. Article 6 provided for an allotment not exceeding 320 acres in extent to the head of a family who "shall desire to commence farming". Pet. App. at 797a. Any other person over 18 years of age not the head of a family could choose 80 acres for the purposes of cultivation. Pet. App. at 797a. Under Article 7 these allotments, once selected for agriculture, ceased to be held in common with the tribe "but the same may be occupied and held in the exclusive possession of the person selecting it so long as he or they may continue to cultivate it." Pet. App. at 797a. This practice of establishing allotments began with George W. Manypenny, Commissioner of Indian Affairs, in 1854 per authorization of the President of the United States, and continued through the Treaty of 1868 with the Shoshone tribe.[5] Individual ownership of allotments was central to the civilization of the tribes in the 1800's.[6]

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[5] COMM'R IND. AFF. ANN. REP., S. EXEC. DOC. NO. 1, 33d Cong., 1st Sess. 249 (1853); Supra See of F. Cohen, *Handbook of Federal Indian Law*, 1982 ed. "Experiments in Allotments," p. 98-105.

[6] F. Cohen, *Handbook of Federal Indian Law*, 1982 ed., at 131-132; "Common property and civilization cannot co-exist," COMM'R IND. AFF. ANN. REP., SEN. DOC. NO. 9, 25th Cong., 3d Sess. 440, 454 (1838); "It is doubtful whether any high degree of civilization is possible without individual ownership of land," COMM'R IND. AFF. ANN. REP., H.R. EXEC. DOC. NO. 1, 44th Cong., 2d Sess. 381, 387 (1876).

The Treaty further encouraged farming on individual allotments by providing under Article 8 for $100 worth of seeds and agricultural implements for the first year and $25 worth of seeds and implements for the next three years. Pet. App. at 798a-799a. Article 8 further provided for instructions from "farmers", which were to be supplied by the United States, to persons who commenced farming on their individual allotments. Pet. App. at 799a. Article 9 went on to provide an annual stipend of $20 for a period of ten years to each individual engaged in agriculture whereas Indians who were "roaming" were to only receive $10 for that ten-year period. Pet. App. at 800a-801a. Finally Article 12 provided for $50 in presents to each of the ten best farmers of the Tribe for a period of three years.

As graphically shown in the Treaty of 1868, the provisions regarding agriculture were all designed as *incentives* to coax *individual* Indians into "commencing farming" on their own allotments. Except for the ownership of the allotment, all incentives were of a limited duration. There were *absolutely no* provisions made in the Treaty for "tribal" development or ownership of agricultural land. "Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the states."[7]

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[7] *Ward v. Race Horse*, 163 US 504 (1896) at 248.

The last act of recognizing the civilization of the Tribes came in the form of U.S. citizenship for the tribes. For the first twenty years of the Wind River Indian Reservation the members of the Shoshone and Arapaho Tribes were not recognized as citizens of the United States. Following the General Allotment Act of 1887 citizenship could be conferred upon two classes of Indians born in the United States: (1) those to whom allotments were made by law or treaty; and (2) those who voluntarily lived away from their tribes and adopted the habits of civilized life.[8] All members of the Wind River Indian Reservation were finally recognized as civilized and made American citizens under the Citizenship Act of 1924.[9]

B. HOMELAND

Article 2 of the Treaty of 1868 provides that the Wind River Indian Reservation was " . . . set apart for the absolute and undisturbed use and occupation of the Shoshone Indians within named . . . ". Pet. App. at 795a. Article 4 of the Treaty went on to provide " . . . they will make said Reservations their permanent home, and they will make no permanent settlement elsewhere; . . . " Pet. App. at 796a.

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[8] Ch. 119, § 6, 24 Stat. 388, 390 (codified as amended at 25 U.S.C. § 349).

[9] Ch. 233, 43 Stat. 253 [codified as carried forward at 8 U.S.C. § 1401(b)].

Despite the fact that the Reservation as set out in Article 2 was to become the permanent home of the Shoshone Tribe, and later the Arapaho Tribe, the Wind River Indian Reservation was, nevertheless, substantially reduced in size by the Tribes and the U.S. Government three times by 1905. Over half of all irrigable acreage went out of Indian ownership through these sales of Reservation land.

Indian ownership of the Reservation was further diminished through the sale of allotments by individual Indians to non-Indians through the General Allotment Act of 1887.[10] Respondents listed in this brief are all non-Indian owners in fee of land originally allotted to individual members of the Tribes.

Under the General Allotment Act of 1887 designated quantities of land were allotted to reservation Indians. The allotments were to be held in trust for at least 25 years at which time the Indian could request a fee Patent which would take the property out of trust and make it subject to State civil and criminal law. Surplus lands in excess of the allotments were to be sold.

The General Allotment Act of 1887, which included the Wind River Indian Reservation obviously altered the definition of "permanent home" as set out in the Treaty. "That 'a treaty may supercede a prior act of congress, and an act of Congress supercede a prior treaty' is elementary."[11]

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[10] ch. 119, 24 Stat. 388 (codified as amended 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381).

[11] *Ward v. Race Horse*, 163 US 504 (1896) at 511.

Although the attitude of total assimilation and elimination of the Reservation changed beginning in the late 1920's and certain unsold lands of the 1905 succession were returned to Indian ownership, nevertheless, the intent of Congress in 1868 was civilization and assimilation. The General Allotment Act took this a step farther with total elimination of the Reservation in mind.

II. GIVEN THE DEFERENCE TO STATE LAW NORMALLY ACCORDED BY CONGRESS IS AN IMPLIED-RESERVATION-OF-WATER NECESSARY TO FULFILL THE PURPOSES OF THE RESERVATION.

A. WYOMING FOLLOWS THE SYSTEM OF PRIORITY OF APPROPRIATION TO THE WATER OF THE STATE.

Congress, when admitting Wyoming to the Union, Wyoming Admission Act, 26 Stat. 222 (July 10, 1890), expressly accepted, ratified, and confirmed the Wyoming Constitution which provided that all waters within the boundaries of Wyoming were property of the State and adopted the system of priority of appropriation.[12] The Wind River Indian Reservation was wholly contained within the boundaries of the State of Wyoming at the time of its creation and there were no provisions in the Act of Admission excluding the Reservation from the priority of appropriation system that had been the law of custom in the State since before the creation of the Reservation.

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[12] WYO. CONST. ART. VIII, §§ 1,3.

Water rights acquired under the prior appropriation system are limited in quantity to the amount of water claimed at the date of appropriation and to the amount actually applied to beneficial use. In times of shortage, the holders of junior rights, those with later priority dates, must forego their use of water from a particular water source in favor of senior appropriators on the same water course.

The doctrine of prior appropriation developed as settlers came west following discovery of gold in California in 1848. They quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the east would not work in the arid lands of the west. Priority of appropriation is recognized in one form or another in all of the mainland western states.[13]

The Treaty of 1868 made no mention of a reservation of water for the Wind River Indian Reservation. In other words, Congress was silent as to whether or not there was reserved for the Wind River Indian Reservation water for irrigation or whether the Reservation would be subject to the system of prior appropriation. However, both two years before the signing of the Treaty in 1868 and two years later, in 1870, Congress enacted statutes recognizing the system of prior appropriation.[14] These two statutes expressly confirmed acquisition of water

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[13] F. Cohen, *Handbook of Federal Indian Law*, 1982 ed., at 576.

[14] Act of July 6, 1866, Ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51), Act of July 9, 1970, Ch. 235, § 17, 16 Stat. 217, 218 (codified at 43 U.S.C. § 661).

rights in accordance with the local custom and laws of prior appropriation and made clear that water rights acquired in this manner were valid against both the federal government and all federal grantees.[15]

Congress deferred to the system of prior appropriation under Wyoming State law in regards to the Wind River Indian Reservation in the Second McLaughlin Agreement of 1904, ratified by Act of March 3, 1905, 33 Stat. 1016. In passing the McLaughlin Act Congress resisted lobbying attempts for the creation of an express limited reserve water right.[16] Again in 1914, Congress resisted efforts to create an express reserved water right on behalf of the Wind River Indian Reservation.[17]

B. THE COURTS IMPLY A RESERVATION OF WATER WHEN NECESSARY TO FULFILL THE PURPOSES OF THE RESERVATION.

The Supreme Court has held that when the government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.[18]

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[15] See *California v. United States*, 438 US 645, 656 (1978); *Broder v. Natoma Water and Mining Co.*, 101 US 274, 276 (1879); *Jennison v. Kirk*, 98 US 453 (1879).

[16] Wyo. Exh. WRIR I & P. 6.

[17] See United States Senate, Hearings before the Committee on Indian Affairs, March 12, 1914, at 279, Wyo. Exh. WRIR I & P, 16.

[18] *Winters v. United States*, 207 US 564 (1908); *Arizona v. California*, 373 US 546 (1963); *Cappaert v. United States*, 426 US 128 (1976); *United States v. New Mexico*, 438 US 696 (1978).

The case of *Winters v. United States*, 207 U.S. 564 (1908) first set out the "implied-reservation-of-water" doctrine. The *Winters* case concerned the Fort Belknap Indian Reservation in Montana, home of the Gros Ventre and the Assiniboine Tribes created by Act of Congress on May 1, 1888. Approximately thirty thousand acres on the Reservation were susceptible of irrigation with the waters of Milk River which forms the northern boundary of the Reservation.[19] Although the United States alleged that on the 5th day of July, 1898, the Indians residing on the Reservation diverted ten thousand miners' inches of water from the river for irrigation of 30,000 acres of land[20], nevertheless, the Ninth Circuit found that only five thousand acres of the thirty thousand acres was actually being irrigated and that five thousand inches of water were required to meet the needs and requirements of the government and Indians for household, domestic, agricultural and irrigating purposes on the Reservation.[21]

Beginning in 1895, Winters and other white settlers upstream from the Belknap Reservation began diverting water and by 1905 had diverted the entire flow so that no water reached any part of the Reservation by way of the Milk River.[22] The United States was then successful in the District Court in permanently enjoining the white settlers from interfering in any manner with the use of five

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[19] *Winters v. United States*, 143 F. 740 (1906).

[20] *Winters*, Supra, 207 US at 566.

[21] *Winters*, Supra, 143 F. at 741.

[22] *Winters*, Supra, 143 F. at 741.

thousand inches of the waters of the Milk River by the Fort Belknap Reservation.

The Ninth Circuit and the United States Supreme Court both upheld the injunction finding that the Treaty impliedly reserved the right to use the waters of the Milk River to the extent reasonably necessary to irrigate Reservation lands to accomplish the purpose of the Reservation and that the purpose of the Reservation was to change the Indians "nomadic and uncivilized" habits and to make them into a "pastoral and civilized people."[23]

The *Winters* holding of an implied-reservation-of-water was subsequently applied by the Courts to other reservations of land by the U.S. Government.[24]

This Court has fully realized that a "careful examination" is required whenever imposing an implied water right on a river system because: 1) the reservation is implied, rather than expressed; 2) the history of Congressional intent in the field of Federal – State jurisdiction with respect to the allocation of water almost invariably defers to State law, and 3) it has recognized that in the arid parts of the West claims for the use of water on Federal Reservations inescapably compete with other public and private claims for the limited quantities of

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[23] *Winters*, Supra, 207 US at 576.

[24] *United States v. District Court for Eagle County*, 401 US 520 (1971); *Cappaert v. United States*, 426 US 128 (1976); *United States v. New Mexico*, 438 US 696 (1978).

waters to be found in the rivers and streams, often resulting in a "gallon for gallon" reduction in the amount of water available for water-needy state and private appropriators.[25] As set out in the brief for Petitioner, State of Wyoming, the water of the Wind River drainage which supplies all the water to the Wind River Indian Reservation is fully appropriated.

The Supreme Court has repeatedly emphasized that Congress reserved "only that amount of water *necessary* to fulfill the purpose of the Reservation, *no more*." *Cappaert*, supra at 141. (Emphasis added.) "Each time this Court has applied the 'implied-reservation-of-water doctrine' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be *entirely defeated*."[26] (Emphasis added.)

Thus, in *Cappaert* pumping of underground water threatened the very existence of the underwater ecological system of Devil's Hole National Monument. If pumping had been allowed to continue the lakes would have dried up, the unique pupfish would have died out and the purposes of the National Monument would have been entirely defeated. The Court in *Cappaert* curtailed the pumping only to the extent necessary to preserve an adequate water level at Devil's Hole. "No more" water was reserved than to fulfill the purpose of the Reservation.

[25] *U.S. v. New Mexico*, Supra, at 1057.

[26] *United States v. New Mexico*, Supra, at 1057.

Again in *Winters*, by 1898 the U.S. Government had the Indians of the Reservation farming ten years after the formation of the Reservation. However, by 1905, the upstream appropriators had appropriated the full flow of the river. The very purpose of turning these nomadic Indians into a pastoral and civilized people would have been entirely defeated if the Court had not intervened. The Court, although recognizing thirty thousand practicable irrigable acres along the Milk River, nevertheless, granted an injunction to only the reasonable needs of the Reservation to civilize its Tribes when it gave five thousand miners' inches, declared by the Court to be sufficient to provide the water for domestic use, stock watering and irrigation of five thousand acres.

C. AN IMPLIED-RESERVATION-OF-WATER IS NOT "NECESSARY" TO FULFILL THE PURPOSES OF THE RESERVATION.

Unlike the Fort Belknap Reservation in *Winters* and Devil's Hole in *Cappaert* the Wind River Indian Reservation was never faced with a situation where the purposes of the Reservation would be "entirely defeated" without an implied-reservation-of-water. Nor has it ever been "necessary" to infer an implied reservation of water to fulfill any of the purposes of the Wind River Indian Reservation.

In 1905, the same year the United States sought the injunction in *Winters*, the Wind River Indian Reservation had sixty state water permits covering 123,588 acres. This 1905 right is senior to most other rights on the stream and has always been sufficient to irrigate the allottees crops

on the Reservation. By 1915 this amount had been increased to 145,000 acres.

The total award of water by the Wyoming Supreme Court to the Tribes of the Wind River Indian Reservation was 103,000 acres. Of this 54,000 acres consisted of acreage which had been irrigated in the past and 49,000 acres consisted of future projects. Most, if not all of the 54,000 historically irrigated acreage is under one of these 1905 permits. The rest were part of allotments sold to non-Indians and some were never put under irrigation or became unproductive.

It seems a little bizarre now that the Wyoming Supreme Court is stating that water for 103,000 acres will *fulfill* the "purpose" of the Reservation when 123,588 acres didn't fulfill the purpose of the Reservation in 1905.

D. THE IMPLIED RESERVATION OF 500,000 ACRE FEET WILL NEVER "FULFILL" THE PURPOSE, AS SET OUT BY THE WYOMING SUPREME COURT, OF MAKING THE WIND RIVER INDIAN RESERVATION AN "AGRICULTURAL RESERVATION".

The Wyoming Supreme Court found that the Wind River Indian Reservation was intended to be an "agricultural" Reservation and thus applied the practicable irrigable acreage standard set out in *Arizona v. California*, 373 US 546 (1963). Pet. App. 32a-41a. Nevertheless, it is obvious from a reading of the Treaty that agricultural was one of the means by which to "civilize" the Shoshone and Arapaho Tribes in the late 1800's but not the purpose of the Treaty.

Agriculture plays a very small part in civilization as it exists today in either the United States or on the Wind River Indian Reservation. As stated before 48 percent of the United States population in 1870 resided on farms and made their livelihood thereon. By 1986 this percentage had fallen to 2.2 percent of the nation's population. [27] Nationally the percentage of Indians employed in agriculture declined from approximately 68 percent in 1940 to 8 percent in 1980.[28] This percentage corresponds with the Wind River Indian Reservation which in 1988 had 8.1 percent of those people employed on the Reservation being involved in agriculture, which 8.1 percent represented 3 percent of the total work force of the Reservation.[29] Giving the Reservation an 1868 priority date and doubling the amount of presently irrigated acres under that award is simply not going to make the Wind River Indian Reservation into an "agricultural" Reservation in the 1980's.

Unlike the Tribes in *Arizona v. California*, who derive most of their income from agriculture, only 3 percent of the income from natural resources on the Wind River

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[27] *Agricultural Statistics 1987*, U.S. Department of Agriculture, Table 549, at 382.

[28] Habrfeld and Musnick, *Indian Economic Development Resources: A Question Of Use, Organization and Control As Much As One of Quality*, in the *ECONOMIC DEVELOPMENT AND LAW CENTER REPORT* 11(June/Feb. 1980).

[29] "W.I.N.D.S." Project - Wind River Indian Needs Determination Survey conducted by the Shoshone and Arapaho Tribes; August 1988.

Indian Reservation came from agricultural production.[30] This percentage is even smaller when you take into account the amount of income derived from other employments besides agriculture by which 92 percent of those employed make their livelihood.

The Tribes in their Cross-Petition for Writ of Certiorari allege that the implied-reservation-of-water with a priority date of 1868 is necessary to provide employment on the Reservation which currently has an unemployment level of 70 percent. [31] In reality, though, the award of the Wyoming Supreme Court of 103,000 irrigated acres with a water right of 1868 would have very little impact on the unemployment rate of the Reservation for two obvious reasons.

The first is that, as pointed out above, only 3 percent of the present day work force on the Reservation is involved in agriculture. If we doubled the amount of acreage from the 54,000 historical acres irrigated to the

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[30] U.S. Department of the Interior, *Report of the Task Force on Indian Economic Development* 32 (1986).

[31] Brief in Opposition for Respondents and Cross-Respondents Shoshone and Northern Arapaho Tribes, November 21, 1988 at 32 and 37. "The water quantified under the PIA standard is desperately needed to improve the economy of the Reservation, where, according to a Governmental study released last month, the unemployment rate among Indians is in excess of 70 percent." The governmental study referred to in that footnote was the "W.I.N.D.S." Project previously referred to in note 27, Supra. The W.I.N.D.S. Project listed the unemployment rate for Arapaho's at 70 percent, Shoshone's at 71 percent, other Indian Tribes at 78 percent and non-Indians at 52 percent, Volume 1 at 4.

103,000 of the award and were able to immediately irrigate those future projects, then the work force employed in agriculture would, theoretically speaking, double from 3 percent to 6 percent and the unemployment rate of the Reservation would drop from 70 percent to 67 percent.[32] Also the amount of income from agriculture on the Reservation would raise from 3 percent to 6 percent of the total derived from natural resources. Obviously, no matter what is done as a result of this lawsuit, the end result will not "fulfill" the purpose of the Reservation as set out by the Wyoming Supreme Court, i.e., that of making an "agricultural" Reservation.

Secondly, despite the high unemployment levels of 70 percent (up from 45 percent in 1982)[33] Indian irrigable land under ditches is going out of production. "Idle" land has risen from 6,271 acres in 1982 to 9,227 in 1987.[34] This

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[32] The correlation between unemployment and water for agriculture is pretty slim. A much higher correlation exists between unemployment and alcoholism, estimated at 80% of the adult Indian population by the ShoRap Treatment Center, a joint tribal alcohol treatment facility on the Reservation.

[33] The unemployment figure came from the 1982 report of Special Master Roncalio. Pet. App. at 568a.-69a. Department of the Interior, Bureau of Indian Affairs, *National Resource Information System, 1987 Inventory and Production Report for the Wind River Indian Reservation.*

[34] Department of the Interior, Bureau of Indian Affairs, *National Resource Information System, 1987 Inventory and Production Report for the Wind River Indian Reservation.* Of the 32,599 acres of Trust land owned by Indians, 16,995 are used and irrigated by Indians, 6,417 acres are irrigated and leased to non-Indians and 9,227 acres sit idle. In other words only half of the Trust lands, are actually operated by Indians. Almost one-third of all Trust land lies idle.

represented 28 percent of all Indian land listed under projects and private ditches in 1987.[35] Although the work force is amply available and acreage under ditches are just waiting for water to be beneficially applied the Wind River Indian Reservation Indians are more interested in pursuits other than agriculture.

One of the obvious reasons that more Indians don't go into farming is that the economical rewards simply do not justify the outlay in time and money. "The U.S. agricultural sector throughout the 1980's has been beset by problems of insufficient demand and excess supply. In order to try to hold up farm prices the Federal Government has poured many billions of dollars into supporting these prices . . . The U.S. as a whole today needs less land in food production, not more. In short, agriculture offers little promise of making any substantial new contributions over the next few years to Indian economic development".[36]

Agriculture today is a highly mechanized industry. Indians are not going to go off the unemployment roles and into agriculture with the $100 worth of implements and seeds guaranteed by the Treaty. The Treaty was fashioned for Indians to become farmers in the late 1800's not 1980's. The only ones who would benefit from the award of water would be those already involved in agriculture

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[35] U.S. Department of the Interior, *Report of the Task Force on Indian Economic Development* (1986) at 120.

[36] U.S. Department of the Interior, *Report of the Task Force on Indian Economic Development* (1986) at 120.

with capital to expand on expansion not unemployed Indians who want to "commence farming".

The Tribes themselves realize that the true value of getting an 1868 award of 500,000 acre feet of water lies not in utilizing that award in agriculture. In their Cross-Petition for a Writ of Certiorari the Tribes state: "Transfers of water play a central role in insuring the efficient use of this scarce resource in the American West. A smoothly operating market system assures that water can be moved from outmoded uses to new, more cost effective ones . . . [and it] would provide the Tribes with a source of critically needed funds . . . "[37]

In contrast to agriculture, education is seen by most residents of the Wind River Indian Reservation as the way of reducing their unemployment levels. 68 percent of the Wind River Indian Reservation adults have completed high school.[38] Less than 2 percent have less than an eighth grade education.[39] The most important statistic is that 41.4 percent were intending to return to school.[40]

The water necessary to fulfill the purpose of the Wind River Indian Reservation has already been appropriated under Wyoming State law with a water right senior to most all other appropriators on the system. Neither an earlier priority date nor an additional award of water to be used in the future will ever *fulfill* the purpose of the Reservation more than that purpose was actually fulfilled in 1905 under State law. In regards to

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[37] Cross Petition for a Writ of Certiorari to the Supreme Court of Wyoming filed by the Northern Arapaho and Shoshone Tribes, Sept. 21, 1988 at 26-27.

[38] W.I.N.D.S. Project, Supra, final report, Vol. I at 23.

[39] W.I.N.D.S. Project, Supra.

[40] W.I.N.D.S. Project, Supra.

the Wind River Indian Reservation this Court should defer to the State law which already protects both the Indian allottees and their successors in their right to a sufficient amount of water to irrigate their lands.

III. THE EVILS OF BEING AWARDED A RESERVED WATER RIGHT

A. THE DILUTION OF THE WATER RIGHT

Prior to this lawsuit both the Indian irrigators and the non-Indian Respondents of this Brief enjoyed primarily a 1905 priority date under State permit. They were recipients of the applications by the U.S. Government in 1905 for permits to irrigate 123,000 acres on the Reservation.[41] Only about 65,000-70,000 acres of the original 123,000 acres actually ever went into production. This includes most of the 54,000 acres of the historically irrigated land of the Indians and approximately 10,000-15,000 acres of the non-Indian owned allotments. This 1905 right is senior to over half of the irrigated acreage on the Reservation. The Riverton Reclamation Project alone accounts for most of the non-Indian owned acreage with 102,000 acres irrigated under a 1906 permit.

The ruling of the Wyoming Supreme Court gave the "Tribes" a reserved water right to the water necessary to

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[41] Any land presently irrigated not specifically contained under a Permit can either have a water right transferred from non-irrigated acreage under the same ditch or can get a water right with a priority date of first application to beneficial use. W. S. 41-3-103, 104; *Merrill v. Bishop*, 27 P.2d 620 (Wyo 1955); Pet. App. 129a-130a.

irrigate the practicable irrigable acreage on the Reservation. This included the "diminished-Reservation" lands which had gone out of tribal ownership in 1905. Pet. App. 72a. This also includes any non-Indian owned lands which are reacquired by an Indian or Tribal purchaser of non-Indian ownership. Pet. App. 751. Once this land is reacquired by an Indian or the Tribe, it could then be sold again to a non-Indian with the reserved water priority date of 1868. Pet. App. 73a-75a.

Potentially then there are approximately 170,000 acres of presently irrigated or historically irrigated land which could be put under the 1868 right, as well as another 49,000 acres under future projects awarded to the Tribes. All of this would come under the practicable irrigable acreage standard of *Arizona v. California*, 373 US 546 (as adopted by the Wyoming Supreme Court). If the decision were left standing based upon practicable irrigable acreage of the Reservation at the time the Reservation was created, then it would only be a matter of time before all irrigable property on the Reservation was sold back into Indian ownership and, more than likely, back into non-Indian ownership, thereby acquiring an 1868 priority date for well over 200,000 acres in the Wind River Basin. This end result would destroy the senior rights of the Indian allottees and their successors on the Reservation, presently enjoyed with their 1905 right under State law.

As set out in the Treaty of 1868, agriculture was meant as an incentive to *individual* Indians to cease their nomadic ways. Incentives consisted of individual ownership in land, money for implements and seeds, and increased stipends for the first ten years. There is absolutely nothing in the Treaty which gives any implied right

to the Tribe as a whole to quantify a "Tribal" water right. The only water right that ever could have possibly been intended to have attached to the Reservation were to the allotments which were put into irrigation by the original allottees or their successors. The Indian and non-Indian owners of those allotments now face a factual scenario where their 1905 priority date, which was senior in right to over 70 percent of the practicable irrigable acreage in the Wind River Basin on the Wind River Indian Reservation, being awarded an 1868 water right which will ultimately be senior to no other rights in the Wind River Basin. Furthermore, the water right of Indian allottees will no longer be owned by them personally, but have been awarded to the "Tribes".

Even in the water-short year of 1988, only junior appropriators to 1906[42] had their water turned off to satisfy senior appropriators. If the whole basin were under an 1868 priority date, those who currently have a 1905 right would lose their priority over the rest of the Basin and have to share the limited quantities of water, which can be mighty slim indeed in late summer.

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[42] Some 1905 rights on the Reservation were turned off in 1988 when the Tribes with their 1868 water right made a false "call" on the river to acquire water of junior 1905 appropriators. The Tribes later acknowledged that the shortage of water was due to Project mismanagement rather than an actual shortage of water. See Ex. B, third paragraph, of Brief in Opposition for Respondents and Cross-Respondents Shoshone and Northern Arapaho Tribes.

B. THE USES TO WHICH AN IMPLIED-RESERVATION-OF-WATER CAN BE PUT TO IS MORE RESTRICTIVE THAN A RIGHT UNDER STATE LAW.

Under Wyoming State law the procedure is available for changing the place of use and for changing the use itself.[43] However, because an implied-reservation-of-water right is only for the specific purposes of the Reservation as deemed at the time of the enactment of the Reservation, it therefore follows that the reserved water cannot be transferred into another use and retain the same priority date.[44] "Where water is only valuable for a secondary use of the Reservation, however, there arises the contrary inference that Congress intended, consistent with its' other views, that the United States would acquire water in the same manner as any other public or private appropriator."[45] Therefore, the water which irrigates the land on the Reservation could not be transferred to a better use on or off the Reservation or, should their property become unproductive, that water right could not be transferred to other irrigable property purchased by them off the Reservation.

If the tribes get an 1868 priority date then the Respondents of this brief have no alternative but to acquire an 1868 priority date under the Wyoming Supreme Court decision in order to protect themselves from a "call" on the river by their 1868 priority date neighbors. However, the award of an 1868 water right to

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[43] WS (1977), §§ 41-3-103, 104.

[44] *United States v. New Mexico*, 438 US 696 (1978).

[45] *United States v. New Mexico*, 438 US 696, 702 (1978).

the Tribes to all practicable irrigable acreage on the Wind River Indian Reservation would ultimately give the Respondents of this Brief, all non-Indian irrigators on the Reservation, as well as all Indian owners of irrigated allotments a water right that would be senior to the right presently enjoyed by them, but ultimately inferior in every respect to the rights presently enjoyed under state law.

CONCLUSION

The decision of the Wyoming Supreme Court should be reversed and remanded with instructions to enter a Decree denying a Federal reserved water right to the Wind River Indian Reservation, affirming those water rights currently irrigated under State Permits with the corresponding priority dates, or with a priority date of first application of water for beneficial use for those acreages not covered by a State Permit.

Respectfully submitted,

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